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No. 00-270

IN THE

# Supreme Court of the United States

RICHARD M. DALEY, *et al.*,
*Petitioners,*

v.

CLUB MISTY, INC.,
doing business as Tequila Roadhouse, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF *AMICUS CURIAE* OF DAVID C. REITZ, DIRECTOR, COLORADO LIQUOR ENFORCEMENT DIVISION IN SUPPORT OF PETITIONERS

SHELLEY ROSS SAXER
ASSOCIATE DEAN, ACADEMICS,
AND PROFESSOR OF LAW
PEPPERDINE UNIVERSITY
SCHOOL OF LAW
Malibu, CA 90263
(310) 456-4623
*Counsel for Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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## QUESTIONS PRESENTED

1. Whether a liquor license, under substantive state law, is a property interest entitled to protection under the Due Process Clause of the Fourteenth Amendment?

2. Whether a local option referendum entitling voters to prohibit liquor sales at a specific location violates the Due Process Clause of the Fourteenth Amendment in conflict with this Court's decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976)?

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## INTEREST OF THE *AMICUS CURIAE* [1]

David C. Reitz, Director, Colorado Liquor Enforcement Division, as *Amicus Curiae* in support of Petitioners, respectfully urges the Court to grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000). Colorado joins with more than forty states to use the local option approach to control liquor sales within the local communities. *See* Shelley Ross Saxer, "Down With Demon Drink!": *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 Santa Clara L. Rev. 123, 153-56 (1994). Although all jurisdictions in Colorado are currently "wet," the local option election, which allows a jurisdiction to vote itself dry, is a vital aspect of Colorado's right under the Twenty-First Amendment[2] to allow Colorado residents to control the effects of liquor sales in their neighborhoods. *See* Colo. Rev. Stat. § 12-47-105 (West 2000). Currently, Colorado's statute, unlike the Illinois statute struck down by the Seventh Circuit in this case, does not allow voters to directly vote a specific address dry. However, it does provide that voters may limit liquor sales by "class" of license. *See* Colo. Rev. Stat. § 12-47-105 (West 2000). Thus, Colorado voters could conceivably target a specific tavern, if such tavern were the only tavern in that class of license in the area.

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* represents that Counsel, Shelley Ross Saxer, has authored the brief in whole with editing assistance from student research assistant, Thomas Inkel, and monetary contribution from Pepperdine School of Law, which, for educational purposes, supplied limited funds for student research assistance and the costs of printing this petition.

[2] Section 2 of the Twenty-First Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

Liquor licenses are subject to the "broad power" granted to states by the Twenty-First Amendment to regulate liquor sales within their borders, and the constitutionality of the single-address referendum procedure must be evaluated in light of this "broad power." *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984); *see also United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 159 (7th Cir. 1985) ("states have, by virtue of the Twenty-First Amendment, broader authority over the liquor business than over any other business"); *Battipaglia v. N.Y. State Liquor Authority*, 745 F.2d 166, 169 (2d Cir. 1984) (Twenty-First Amendment "should give the states full authority to deal with the subject of intoxicating liquor"). Yet, the courts in Colorado, as in other states, have struggled with the issue of whether a liquor license is a property interest, deserving of constitutional protection. *See, e.g., Mr. Lucky's, Inc. v. Dolan*, 591 P.2d 1021, 1022-23 (Colo. 1979) ("present liquor license, like any business license, is a property right which is entitled to due process protection. . . . [but] there is no unlimited right to a liquor license, and once granted a liquor license is always subject to valid regulations under which it was issued"); *New Safari Lounge, Inc. v. City of Colorado Springs*, 567 P.2d 372, 375 (Colo. 1977) ("[a] liquor license is a type of property right, but it is still a relatively restricted one, and it is subject to those regulations under which it was issued"); *City of Manitou Springs v. Walk*, 367 P.2d 744, 746 (Colo. 1961) (no vested right to renewal of beer license); *Gem Beverage Co. v. Geer*, 334 P.2d 744, 746 (Colo. 1959) ("[u]nder applicable statutes and opinions of this court it is settled that there is no inherent right to carry on the business of selling alcoholic beverages"); *A.D. Jones & Co. v. Parsons*, 319 P.2d 480, 483 (Colo. 1957) (liquor license is property within the meaning of the Due Process Clause although it is not technically property); *see also* Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 Hastings Const. L.Q. 441

(1995) (observing that Colorado classifies the liquor license as a constitutionally protected property interest).

Inasmuch as "states have, by virtue of the Twenty-First Amendment, broader authority over the liquor business than over any other business,"[3] it is disconcerting that Colorado courts have generally given liquor licensees greater protection than has been allowed other business licensees, such as bail bondsmen, psychologists, nurses, and state probationary employees. *See Ficarra v. Department of Reg. Agencies, Div. of Ins.*, 849 P.2d 6, 20 (Colo. 1993) (no property interest in renewal of a bail bondsman license entitling the licensee to the protections of procedural due process); *Colorado Soc'y of Community & Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707, 713 (Colo. 1987) (psychologists had no constitutionally protected claim of entitlement to continue practicing their profession under licensing exemptions later repealed); *Kibler v. State*, 718 P.2d 531, 537-38 (Colo. 1986) (nurse had no constitutionally protected interest in license); *Department of Health v. Donahue*, 690 P.2d 243, 249 (Colo. 1984) (state probationary employee did not have a protected interest in continued employment sufficient to create a constitutionally protected right to a hearing before discharge). Similarly, the Tenth Circuit in *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1196 (10th Cir. 1999) held that federal grazing permits were not constitutionally protected property interests because the permits were statutorily declared not to be property interests and were "revocable at the government's pleasure." This discrepancy in how liquor licensees are treated as compared to other business licensees illustrates the difficulty that both state and federal courts are having with the issue of whether the liquor license, under state substantive law, is a property interest. Therefore, Colorado and other states would be greatly benefited by this Court's guidance as to how a state's

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[3] *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 159 (7th Cir. 1985).

regulatory structure for liquor licensing under its Twenty-First Amendment authority affects the determination of whether or not a constitutionally protected property interest exists.

Given the documented and disturbing relationship between liquor and crime, Colorado, along with other states, is keenly interested in exploring new approaches to deal with this grave problem. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Reversal of the Seventh Circuit's decision should be expected to spur considerable innovation by the states, which are now stifled by both the decision below and the similar decision of the Sixth Circuit in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991). The Colorado Liquor Enforcement Division is vitally interested in receiving guidance from this Court as to whether a liquor license, restricted by local voting control, is a constitutionally protected property interest and whether communities will retain their ability to control the distribution of alcoholic beverages in their neighborhoods through use of the referendum process.

## SUMMARY OF ARGUMENT

The Seventh Circuit concluded that a state statute, allowing voters to prohibit the retail sale of alcoholic beverages at a specific address, is unconstitutional as a due process violation. The Seventh Circuit designated an Illinois liquor license to be a property interest deserving of protection under the Due Process Clause of the Fourteenth Amendment, despite the conclusion by some other federal circuits and Illinois state courts that it is not. In holding that a referendum affecting this property interest violated due process, the Seventh Circuit deprived voters of the right to use the referendum process to exert local control over the quality of life in their neighborhoods when liquor license holders generate adverse effects.

There is a conflict among the circuits, as well as between federal and state courts, as to whether a liquor license, under substantive state law, is property within the meaning of the Due Process Clause, reflecting a need for guidance from this Court. Therefore, the petition for certiorari should be granted by this Court to end the conflict among the federal courts over this issue and to make clear, based on the Court's past decisions, that state law must be used to determine whether the nature of the liquor license makes it a property interest deserving of protection under the Due Process Clause of the Fourteenth Amendment. There is also a need to resolve the conflict between this Court's prior decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) and the Seventh Circuit's finding that a local option directed at a single parcel is an unconstitutional use of the referendum power.

This Court should act to resolve the conflict among circuits and between state and federal courts as to whether a liquor license, under substantive state law, is a property interest subject to Due Process protection under the Fourteenth Amendment. Furthermore, this Court should clarify the extent to which communities will be allowed to use the referendum process to directly address offending land uses in their neighborhoods.

## REASONS FOR GRANTING THE PETITION

### I. THIS COURT SHOULD ACT TO RESOLVE THE CONFLICT AMONG CIRCUITS AND BETWEEN STATE AND FEDERAL COURTS AS TO WHETHER A LIQUOR LICENSE, UNDER SUBSTANTIVE STATE LAW, IS A PROPERTY INTEREST SUBJECT TO DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT.

The Seventh Circuit, when it decided "to bite the bullet" and pronounce that an Illinois liquor licensee has a property interest, cited case law "that has accreted" since its decisions in *Reed v.*

*Village of Shorewood*, 704 F.2d 943, 948-49 (7th Cir. 1983) (holding that Illinois liquor license is property for the purposes of the Fourteenth Amendment due process clause) and *Philly's v. Byrne*, 732 F.2d 87, 90-91 (7th Cir. 1984) (holding that there was no denial of due process so the issue of whether there was a deprivation of property was left open). *See Club Misty*, 208 F.3d at 619. Unfortunately, the Seventh Circuit's citation of case law included only those circuits which have found a protected property interest in a state licensing scheme: the Second, Fifth, Sixth, and Seventh Circuits. The court's citation did not include conflicting decisions from the Eighth, Tenth, and Eleventh Circuits, as discussed below.

By citing decisions from other circuits in support of its decision to find a property interest under Illinois law, the Seventh Circuit missed the opportunity to distinguish conflicting circuit decisions. The court did not restrict its decision to Illinois' underlying state law scheme, but instead referenced property interest determinations from other jurisdictions to resolve the extent of constitutional protection under *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Accepting from *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) that "[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause," this Court should resolve the split among the circuits over the criteria used to determine whether a state law license, specifically a liquor license, is subject to constitutional protection under the Due Process Clause.

Federal courts have struggled with the question of whether there exists a property interest in a liquor license and, as in this case, have sometimes contradicted state court holdings.[4] For

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[4] *See, e.g., In re McDaniel*, 1988 Bankr. LEXIS 1428 (N.D. Ind. 1988) ("Although a legal dispute has raged for years as to whether a liquor license is property or constitutes a right to property, state courts have held that liquor

example, in a very similar case in the Sixth Circuit, the court in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991) held that a liquor license in Ohio was property protected under the Due Process Clause, despite an Ohio state law refusing to define a liquor license as property. *See id.* at 715-16; *see also 37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 619-20 (6th Cir. 1997) (affirming that Ohio liquor license is property, but holding that local option process was legislative in nature and did not violate due process because process could not preclude sales at any specific establishment as was done in *Brookpark*); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171-72 (6th Cir. 1990) (noting that an Ohio liquor license "constitutes property within the meaning of the Bankruptcy Code"). The Sixth Circuit in *Brookpark*, similar to the Seventh Circuit's decision here, held that the referendum process permitting voters to revoke a specific license based on a liquor law violation was facially invalid as a due process violation. *See Brookpark*, 951 F.2d at 717.

The Third Circuit recognizes a property interest in a Pennsylvania liquor license subject to a lien for unpaid federal employment taxes, although the license does not constitute property subject to security creditors under state law. *See 21 West Lancaster Corp. v. Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1984). A liquor license is also considered property for purposes of a bankruptcy estate within the definition of Section 541 of the Bankruptcy Act. *See In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991). In addition to these narrow holdings, a district court in New Jersey has held that a liquor license is property within the meaning of the Due Process Clause, despite the New Jersey Alcoholic Beverage Law statute declaring that "[u]nder no circumstances . . . shall a license, or rights thereunder, be deemed property." *Sea Girt*

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licenses are subject to seizure and sale by the federal government despite state law to the contrary. (citations omitted) The same has been true of the federal courts.").

*Restaurant v. Borough of Sea Girt*, 625 F. Supp. 1482, 1486, 1487 (D.N.J. 1986), *aff'd mem.*, 802 F.2d 448 (3d Cir. 1986). The Ninth Circuit has also treated the liquor license as a property interest in limited situations. In *In re Kimura*, 969 F.2d 806, 811 (9th Cir. 1992), the Ninth Circuit "determined that an Alaska liquor license is property subject to the federal tax lien."

Finally, although neither the Second nor the Fifth Circuit has specifically addressed the liquor license issue, two recent decisions cited by the court in the *Club Misty* decision, indicate that certain rights will be constitutionally protected as entitlements under state law, even though these rights were subject to express restrictions at the time of creation. The Second Circuit in *Furlong v. Shalala*, 156 F.3d 384, 395 (2d Cir. 1998) held that a physician fee schedule, providing Medicare-approved rates for reimbursement of services, constituted a due process property interest based upon a consistent pattern of Administrative Law Judge decisions, even though the fee schedule was subject to modification through policy statements and the application of a discretionary rule to reduce reimbursement below the fee schedule rate. The Fifth Circuit in *Frazier v. Garrison*, 980 F.2d 1514, 1530 (5th Cir. 1993) held that public school teachers hired under a fixed term contract have a "constitutionally protected property interest in employment until the term of the contract has expired." This property interest in employment exists even for those teachers who were required to be certified at the time of employment, but have been decertified under Texas law because they failed to pass the Texas Examination for Current Administrators and Teachers (TECAT). *Id.*

In addition to contradicting state courts in determining whether a liquor license constitutes a property right, federal courts have also contradicted each other. While the Third, Sixth, Seventh, and Ninth Circuits have held that a liquor license is a property right deserving of due process protection, recent decisions from the Eighth, Tenth, and Eleventh Circuits,

which have involved either liquor licenses or state licenses similar to a liquor license, indicate that a liquor license would not be considered a property right for purposes of protection under the Due Process Clause.

In the Eighth Circuit, a bingo hall license initially issued by Minnesota state was not renewed because the city refused to approve the renewal. *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 719 (8th Cir. 1995). The court held that the licensee "failed to show that its expectation in the renewal of its bingo hall license rose to the level of a property interest created by state law." *Id.* at 719, 720 (citing *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326 n.1 (Minn. 1983) (Minnesota Supreme Court in analogous situation involving liquor license stated that "under Minnesota law, there is no property right in a liquor license")); *see also Flesner v. City of Ely*, 863 F. Supp. 971, 981 (D.C. Minn. 1994) (under Minnesota law, there is no right to a liquor license renewal for due process purposes). In an earlier decision involving a liquor license, the Eighth Circuit in *Zenco Dev. Corp. v. City of Overland*, 843 F.2d 1117 (8th Cir. 1988) upheld a district court's determination that there is no protectable property interest in the renewal of a liquor license. *Id.* at 1119; see also *Zeus Corp. v. City of Decorah*, No. 96-3034, 1997 U.S. App. LEXIS 5629 (8th Cir. 1997) (affirming the district court holding that appellants "do not have a constitutionally protected property right or interest in the renewal of their liquor license" under Iowa liquor license procedures).

Similarly, the Tenth Circuit in *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999) held that there was no property interest in a federal grazing permit because the Forest Service was expressly authorized by Congress to change the terms and conditions of the permits once an environmental analysis had been completed. *Id.* at 1201. *See also Wal-Mart Stores, Inc. v. City of Cheyenne*, No. 96-8080, 1997 U.S. App. LEXIS 21028 (10th Cir. 1997) (Wal-

Mart did not have a constitutionally protected property interest in a liquor license); *but see Bogus v. American Nat'l Bank of Cheyenne, Wyoming*, 401 F.2d 458, 460-61 (10th Cir. 1968) (even though liquor control statute considers a license a personal privilege, license has characteristics of property and is considered property within the scope of the Uniform Commercial Code such that a security interest can be created).

Finally, in the Eleventh Circuit, the court in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998) concluded that, "under Alabama law, a municipal license to operate a bail bonds business is not government property." *Id.* at 1295-97 (citing *Arrington v. Dickerson*, 915 F. Supp. 1503, 1509 (M.D. Ala. 1995) (liquor license not considered property in Alabama)). The *Shotts* court noted that "Alabama recognizes no property interest in any business license as against the right of the state to revoke it." *Id.* at 1295; *see also Cheek v. Gooch*, 779 F.2d 1507, 1508 (11th Cir. 1986) (Georgia "state law does not grant Cheek a property interest in the opportunity to acquire a [liquor] license"). Therefore, a state scheme whereby a liquor license was legislatively subject to revocation based upon a local vote would not likely give rise to a protectable property interest in the licensee in either the Eighth, the Tenth, or the Eleventh Circuits.

Consistent with its previous decisions, this Court needs to give national guidance to the process of determining whether, under a particular state's law, a liquor license will be treated as a property interest. *See Tracy v. Ginzberg*, 205 U.S. 170, 177 (1907) (refusal of police commissioners board to reissue liquor license was not a deprivation of property without due process of law because "expectation called a right or property was of the board's creation and therefore subject to the limitations which the board imposed"); *City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973) (Court remanded case involving denial of liquor license renewal applications to district court to determine whether liquor license was constitutionally protected property based on the Court's decisions in *Board of Regents v. Roth*, 408

U.S. 564 (1972), *Perry v. Sindermann*, 408 U.S. 593 (1972), and *California v. LaRue*, 409 U.S. 109 (1972)). Local regulation of liquor does vary from state to state, but that is the essence of the power conferred on the States by the Twenty-First Amendment. The question of whether there is a property interest in a liquor license also arises in a multitude of factual contexts. However, this is exactly why this Court needs to give guidance. Although the Court gave some guidance for this process in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), there is clearly a need for further guidance in light of *Board of Regents v. Roth*, 408 U.S. 564 (1972), which has caused the federal courts to scatter on this issue. There is no basis for such widely varying results nationally on the question of whether the property interest conferred by state authority includes as part of its definition those restrictions expressly attached to the interest, e.g., renewal rights, conditions for retaining the property interest, or revocation by the voters.

The reality is that States are not now able to regulate liquor within their borders because federal courts are finding a property interest regardless of the underlying state substantive law. While a decision by this Court in this case cannot address all state statutes and all factual contexts out of which the property question arises, it can make clear the relationship between *Roth's* requirement that state law determine whether a statutorily conferred interest grants a property interest and cases such as *Tracey*, where a liquor license was found not to be a property interest. This consistency and certainty in outcome is critical to the states as they seek to exercise the broad authority over the distribution and sale of liquor that they were granted under the Twenty-First Amendment.

## II. THIS *COURT SHOULD CLARIFY THE EXTENT* TO WHICH COMMUNITIES WILL BE ALLOWED TO USE THE REFERENDUM PROCESS TO DIRECTLY ADDRESS OFFENDING LAND USES IN THEIR NEIGHBORHOODS.

The overconcentration of liquor outlets in urban neighborhoods is a social problem requiring strategies such as state and local regulation, common law nuisance actions, restrictive covenants, and community activism and redevelopment to address these outlets' adverse effects on neighborhoods. Neighborhoods will not be satisfied to rely solely on state regulatory agencies to control offending liquor outlets because "[l]ocalism as a value is deeply embedded in the American legal and political culture." *See* Shelley Ross Saxer, *Local Autonomy or Regionalism? Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 Ind. L. Rev. 659, 677 (1997) (quoting Richard Briffault, *Our Localism: Part I C The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 1 (1990) and discussing the importance of local autonomy). Depending on state authorities to determine whether or not an offending license should be revoked does not protect all the interests that may warrant voting an address or a specific class of license dry. An establishment or a specific class of license may cause significant problems in a neighborhood, but these problems may not rise to the level of a revocable offense.

States have freely delegated to local authorities their general police power to regulate land use for the health, safety, and welfare of the people. *Id.* at 677. Thus, the "ample power to prohibit the sale of alcoholic beverages in inappropriate locations" exists "entirely apart from the Twenty-First Amendment." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). Colorado, in addition to many other states, including Illinois, has enacted a local option provision to allow communities to regulate for the health, safety, and welfare of its

residents through use of the referendum process.[5] No one is better suited to make decisions regarding the quality of life in a neighborhood than the residents of that neighborhood. Therefore, a state's decision to allow a community to locally regulate through a single-address local option referendum is entitled to great deference and this Court should continue to reject the view that referenda create an impermissible risk of prejudice since "provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra*, 402 U.S. 137, 142 (1971).

This Court in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976), held that "the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance" because it is not a delegation of power, but is instead a decision properly reserved to the people under the state constitution. An earlier decision by the Ninth Circuit in *Southern Alameda Spanish Speaking Org. v. Union City, California*, 424 F.2d 291, 294 (9th Cir. 1970) observed that the referendum "is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest."

In *City of Eastlake*, a real estate developer applied for a zoning change from light industrial zoning to multi-family residential on an eight-acre parcel. *City of Eastlake*, 426 U.S. at 670. The Planning Commission recommended the change to the City Council, but the city charter required that any land use

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[5] Cities are also addressing the issue of neighborhood control over the quality of life by forming neighborhood councils. Los Angeles voters in June 1999 approved a new City Charter which created a Department of Neighborhood Empowerment (DONE) and mandated a citywide system of neighborhood councils. For more information, see http://www.lacity neighborhoods.com.

changes be approved by a vote of the people. *Id.* The proposed zoning change was not approved during the referendum process and the Ohio Supreme Court eventually invalidated the process, "[c]oncluding that enactment of zoning and rezoning provisions is a legislative function, . . . [and] that a popular referendum requirement, lacking standards to guide the decision of the voters, permitted the police power to be exercised in a standardless, hence arbitrary and capricious manner." *Id.* at 671-72. This same concern was expressed by the majority in *Club Misty*, where it opined that "[t]here is no standard to guide voters in deciding whether to void a liquor license. . . . The possibilities [of arbitrary and capricious behavior] are myriad and some of them are unsavory, and against them the procedure established by the challenged statute offers no protection at all." *Club Misty,* 208 F.3d at 621. However, this Court in *City of Eastlake* reversed the Ohio Supreme Court and its concerns for standardless local votes. *City of Eastlake*, 426 U.S. at 672. The *Club Misty* majority opinion, instead of following the *City of Eastlake* majority, echoes Justice Stevens' dissenting view in *City of Eastlake* that "we are concerned with the fairness of a provision for determining the right to make a particular use of a particular parcel of land. In such cases, the state courts have frequently described the capricious character of a decision supported by majority sentiment rather than reference to articulable standards." *Id.* at 690 (J. Stevens, dissenting).

The act of rezoning the one eight-acre parcel in *City of Eastlake* may very well appear to be "spot" zoning or a "spot" referendum. See *id.* at 680 (J. Powell, dissenting). But this Court allowed the "spot" referendum, noting that the Ohio Supreme Court found that the rezoning at issue was legislative in nature and, therefore, subject to the referendum process. *Id.* at 673-74. In contrast, the court in *Club Misty* is bothered by the voters ability to "evict a particular seller" and invalidates the referendum process on a finding that limiting the vote to a specific street address converts the character of the action from

legislative to adjudicative, making it not appropriate for delegation to the people. *Club Misty*, 208 F.3d at 622.

Similar to the *Club Misty* holding, some circuits have invalidated a referendum process that targets a particular landowner. *See, e.g., Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991) (potential for arbitrary targeting of individual licensees requires a finding that Ohio's "particular premises" local option statute facially violates the Due Process Clause of the Fourteenth Amendment). However, this Court in *City of Eastlake*, in addition to other federal and state courts, has allowed the referendum process to affect specific property. *See, e.g., Philly's v. Byrne*, 732 F.2d 87, 93 (7th Cir. 1984) (even though the small size of a precinct may mean that only one liquor store or bar will be banned by a referendum vote, the local-option feature of Illinois' law is not unconstitutional); *Southern Alameda Spanish Speaking Org. v. Union City, California*, 424 F.2d 291, 294 (9th Cir. 1970) (referendum affecting a single tract of land does not violate due process of landowner); *Taylor Properties, Inc. v. Union Co.*, 583 N.W.2d 638, 642 (S.D. 1998) (South Dakota law allows for a referendum vote on a rezoning involving a single landowner with a parcel of approximately thirteen acres); *Thompson v. McKinley Co.*, 816 P.2d 494, 498 (N.M. 1991) (special legislation applicable only to named individuals is validly subject to the referendum process to prohibit retail liquor establishments with drive-up windows from selling alcoholic beverages); *Florida Land Co. v. City of Winter Springs*, 427 So.2d 170, 171 (Fla. 1983) (city ordinance effecting a zoning change for a specific parcel of land can be subject to a referendum vote); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 571 (Cal. 1980) (rezoning ordinance affecting even a relatively small parcel is a legislative act subject to the initiative process). Thus, the fact that an individual landowner is targeted by the referendum process does not convert a legislative process, reserved by the people to directly regulate liquor outlets under the Twenty-First Amendment, into an adjudicative process not appropriate for a

direct vote of the people. *See Club Misty*, 208 F.3d at 617 ("[I]f 40 percent of the registered voters in a precinct petition the board of elections for a vote on whether to prohibit the sale of liquor at a particular street address, the question shall be put to the precinct electorate at the next election and if a majority votes in favor of the prohibition the license of the establishment located at that address shall become void thirty days after the election") (citing 235 Ill. Comp. Stat. 5/9-2 (1998)).

If desired land use changes sought by property owners are rejected by the voters, administrative relief is potentially available. *City of Eastlake*, 426 U.S. at 679 n.13. Additionally, if the referendum result itself is unreasonable, the landowner can challenge the zoning restriction in state court as unreasonable or arbitrary action. *Id.* at 676 ("If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction."); *see also Southern Alameda Spanish Speaking Org. v. Union City, California*, 424 F.2d 291, 294 (9th Cir. 1970) (holding that legislation resulting from referendum process did not "constitute an arbitrary or unreasonable exercise of the police power"). Therefore, this Court should grant the writ of certiorari in order to restore a community's right to target an offending land use using the referendum process. However, there is no assurance that the people "will act according to consistent standards. The critical constitutional inquiry, rather, is whether the zoning restriction produces arbitrary or capricious results." *City of Eastlake*, 426 U.S. at 675 n.10.

"[N]o national or even regional consensus has emerged with respect to the morality and consequence of alcoholic beverages. It has seemed best, in default of consensus, to leave the matter to local preference as expressed in the voting booth." *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984). Most states have delegated their Twenty-First Amendment authority to regulate liquor sales to local authorities by way of the local option

election. *See* Shelley Ross Saxer, "Down With Demon Drink!": *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 Santa Clara L. Rev. 123, 187 (1994). "In addition to local option elections, the referendum process can be used to give voters control over the proliferation of liquor outlets in their neighborhoods." *Id.* "Communities must be given effective local control over liquor outlets in order to successfully revitalize their neighborhoods and ensure that at least one of several urban life problems has been solved." *Id.* at 191.

Granting the Petition for Certiorari filed in this case will allow the Court to resolve a circuit split and give guidance to federal and state courts as to how to determine whether a liquor license is a property interest deserving of Due Process protection under the Fourteenth Amendment. It will also allow the Court to determine whether states such as Illinois and Colorado will be able to use the referendum process to address the issue of problematic alcoholic beverage distribution in urban areas by giving communities direct control over offending land uses.

## CONCLUSION

For the reasons outlined above and in the City of Chicago's Petition, the *amicus* urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

SHELLEY ROSS SAXER
ASSOCIATE DEAN, ACADEMICS,
AND PROFESSOR OF LAW
PEPPERDINE UNIVERSITY
SCHOOL OF LAW
Malibu, CA 90263
(310) 456-4623
*Counsel for Amicus Curiae*

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